STATE OF MICHIGAN

COURT OF APPEALS

BARBARA LUNDY, Plaintiff-Appellant,	UNPUBLISHED January 18, 2011
v	No. 294611 Wayne Circuit Court
THYSSEN KRUPP STEEL NA, INC., OLON VINCENT HALE, and WILLIAM SANFILIPPO, Defendant-Appellees.	LC No. 08-105390-CD

Before: FORT HOOD, P.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting Defendants' motion for summary disposition and dismissing her claims under the Elliot Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. We affirm.

I. BACKGROUND

This case arises out of plaintiff's allegations of discrimination, a hostile work environment, disparate treatment, and retaliation at the hands of her superiors who terminated her employment with defendant Thyssen Krupp Steel NA, Inc., (TKS). Defendants maintain that plaintiff's termination was due to her poor work performance that persisted despite the imposition of appropriate disciplinary procedures as set forth in the parties' collective bargaining agreement.

TKS operates a steel processing plant in Detroit that supplies customers primarily in the automotive sector. Nearly 90 percent of TKS's business is with Chrysler Corporation. Plaintiff was employed with TKS from December 16, 1996, until her termination on August 23, 2006. She held several different positions during this period, and at the time of her termination, was working as a line inspector – a position she had held since 1999. As a line inspector, plaintiff was responsible for inspecting steel loads known as blanks (i.e., pieces of steel cut to customer specification) for damage and defects, and for ensuring that the processing met customer specifications. In the event plaintiff discovered a defect, she was to report the defect to a supervisor, place the lift on hold, complete a quality hold tag, and make a notation in her production report.

Additionally, as an employee with union representation, plaintiff was subject to a collective bargaining agreement (CBA), which permitted TKS to fire or suspend employees with just cause and also provided work rules for employees as part of the terms and conditions of employment. Applicable to plaintiff's responsibilities in this case was Work Rule No. 10. That rule outlined progressive disciplinary procedures for "[p]oor workmanship such as, but not limited to, failure to report significant work problems, excessive scrap, etc., where it can be shown the employee is directly responsible and such occurrences are repetitive or recurring in nature." The procedures consisted of a written warning for the first violation, a three-day suspension for the second, and possible termination for the third.

In the spring of 2006, TKS began receiving complaints from Chrysler concerning packaging, staggered lifts, the placement of steel on skids, and steel flatness – all issues subject to plaintiff's quality inspection. TKS addressed the complaints by conducting town hall meetings, where inspectors were instructed to conduct more careful examinations, and by posting quality alert posters that illustrated potential defects that inspectors such as plaintiff should remedy. Despite attending a meeting and having a poster in her work station, plaintiff failed to follow TKS's new tagging procedure used to identify defective steel. On June 15, 2006, plaintiff's supervisor, defendant Gary Edds, and the human resources manager, defendant William Sanfilippo, met with plaintiff and her union representative to discuss her "poor work performance." Plaintiff claimed ignorance of the tagging procedures, declined additional training, and was given a counseling statement indicating her failure to follow processing order instructions. Plaintiff declined a second offer for training a week later.

Despite these offers and warnings, problems with plaintiff's work persisted. First, on June 27, 2006, plaintiff received a written warning for violation of Work Rule No. 10 due to her continued failure to follow tagging procedures as well as for approving defective steel.[1] Although plaintiff filed a grievance, she did not appeal its subsequent denial. Second, on July 31, 2006, plaintiff received a three-day suspension, this time for inaccurately documenting the number of pieces processed. Notably, plaintiff admitted this recording failure, but still filed a grievance, which was also denied. Again, plaintiff did not appeal.

Third, on August 10, 2006, plaintiff received another written warning for inaccurately recording scrap data in violation of Work Rule No. 10. This warning indicated that plaintiff was subject to discharge.[2] And finally, on August 23, 2006, it was discovered that plaintiff's production report failed to properly identify a staggered (i.e., defective) lift and that she had

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[1] The defective steel consisted of excess steel known as doglegs.

[2] Precipitating this warning was an investigation by TKS administrator Irene Onkala, who determined that the scrap at issue was subject to plaintiff's inspection. Although plaintiff denied culpability for incorrectly recording the scrap on the computer system, plaintiff was using the computer terminal from which the data was entered around the time the data was entered. Notably, the incorrect entry listed 8.9 million pounds of scrap, an amount that would have taken the plant one year to produce.

approved two additional staggered lifts for shipment. The employee warning notice for this incident again indicated that plaintiff was subject to discharge. As this constituted plaintiff's fourth Work Rule No. 10 violation in just a few months, Edds, Sanfilippo, and TKS chief operating officer, Dave Walsh, decided to terminate plaintiff on that date. Plaintiff filed grievances challenging the Work Rule No. 10 violations leading to her termination, and the matter proceeded to arbitration. After conducting a four-day hearing, the arbitrator concluded that TKS had just cause to terminate plaintiff for repeated violations of Work Rule No. 10 and denied plaintiff's grievances on January 29, 2008.

Exactly one month later, on February 29, 2008, plaintiff filed the complaint underlying the instant action. The complaint alleged sexual discrimination, age discrimination, disparate treatment, retaliation, and hostile work environment. Defendants answered in due course, and discovery commenced.

Through her own depositions and affidavit as well as those of her former supervisor, Kevin Dawson, plaintiff presented evidence that Olon Hale: disliked plaintiff because she was a woman and had never written-up any white inspectors,[3] conspired with Sanfilippo to fire her, routinely made discriminatory comments to plaintiff (such as calling her an "old bitch," referring to her as a "problem," and telling her to "get her black ass over . . . to the machine,"), had failed to discipline other inspectors for approving the same steel with defects similar to that approved by plaintiff and had instructed Dawson not to discipline these other employees. Despite these problems and plaintiff's complaints, Dawson explained, TKS failed to take the appropriate measures to remedy Hale's unjust treatment of plaintiff. Additionally, plaintiff and Dawson claimed that Sanfilippo offered to bribe another employee to help him fire plaintiff, even though Sanfilippo was aware that plaintiff had never actually committed a Work Rule No. 10 violation.

On July 9, 2009, defendants moved for summary disposition on the grounds that plaintiff was fired for just cause. Additionally, defendants requested dismissal of plaintiff's claims because, other than presenting isolated comments, plaintiff failed to prove discrimination or harassment, establish causation, or demonstrate involvement in a protected activity. Relying exclusively on her testimony as well as that of Dawson, plaintiff responded that Hale's comments, management's failure to address her complaints about these comments, the failure to discipline other inspectors, and the failure to properly follow the grievance procedure all provided ample support for her claims.

At the ensuing motion hearing, the trial court granted defendant's motion. In reaching this decision, the only explanation the trial court provided was that plaintiff had failed to satisfy the requirements of the ELCRA and additionally failed to establish a prima facie case of discrimination or rebut defendants' nondiscriminatory business reason for her termination. On September 28, 2009, an order was entered reflecting this ruling and dismissing plaintiffs' claims. The instant appeal followed.

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[3] Both Hale, who was a supervisor, and plaintiff are black.

II. ANALYSIS

Before we address the merits of the appeal, we must first provide a few remarks about plaintiff's brief on appeal. As defendants point out, plaintiff's brief fails to comply with MCR 7.212(C)(6) and (7), as plaintiff's brief is replete with conclusory factual allegations and arguments completely untethered to any citation in the record. Indeed, plaintiff's brief "statement of facts" contains no citation to any record evidence, contrary to the explicit requirements of MCR 7.212(C)(6) (requiring that the statement of facts be made with "specific page references to the transcript, pleadings or other documents or paper filed with the trial court."). This same duty applies when opposing a properly supported motion for summary disposition. See *Barnard Manufacturing Co Inc, v Gates Performance Engineering, Inc*, 285 Mich App 362, 374-375; 775 NW2d 618 (2009).

Here, plaintiff's brief on appeal only cites (in what we consider to be the argument section) to the three affidavits signed by Dawson, her own affidavit, and in one paragraph, several pages of her deposition. As to her deposition, she cites comments allegedly made by Hale, yet both plaintiff and Dawson testified they had no knowledge that Hale played any role in the decision to terminate plaintiff's employment (and defendants say he had no role), and as to the affidavits, plaintiff usually only makes passing reference to them, as opposed to citing them and the paragraphs that support the asserted fact. This is not sufficient, and as detailed below, when plaintiff does cite to a particular paragraph within the affidavits, it does not adequately support her claims.

Plaintiff first argues that direct evidence of age and sex discrimination precluded summary disposition.[4] Contrary to plaintiff's assertion in her "Statement of the Issues Presented," a trial court's decision on a motion for summary disposition is not discretionary. Rather, it pertains to an issue of law that we review de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted, therefore, when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If the nonmoving party would bear the burden of proof at trial, that party must show there is a genuine issue of material fact by setting forth satisfactory evidence. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). "But such materials shall only be considered to the extent that [they] would be admissible as evidence . . . ." *Woodman v Kera*,

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[4] Contrary to plaintiff's assertion in her statement of facts, defendants raise no issue that arbitration barred the instant action under collateral estoppel.

LLC, 280 Mich App 125, 135; 760 NW2d 641 (2008), aff'd 486 Mich 228 (2010) (quotation marks and citations omitted); MCR 2.116(G)(6). Under no circumstances, however, is mere speculation or conjecture sufficient to establish a genuine issue of material fact. *Libralter Plastics, Inc v Chubb Group*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

The ELCRA prohibits an employer from discriminating with respect to the terms and conditions of employment because of age or sex. MCL 37.2202(1)(a). A plaintiff may establish an ELCRA violation through either direct or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield Of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Direct evidence shows "that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001) (quotation marks and citation omitted). Put differently, "[d]irect evidence is evidence that, if believed by the trier of fact, would prove discriminatory conduct on the part of the employer without reliance on inference or presumption." *Cerutti v BASF Corp*, 349 F3d 1055, 1061 (CA 7, 2003).[5] "In cases involving direct evidence of discrimination, a plaintiff may prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Sniecinski*, 469 Mich at 132. In this respect, "direct proof that the discriminatory animus was causally related to the adverse employment decision" is required. *Id*. at 135.

Plaintiff cites the following as direct evidence of discrimination:[6] (1) Hale routinely called plaintiff an "old bitch" and "old ass," and threatened that if he made plaintiff lose her job, she would not find another with similar compensation, (2) Dawson knew Sanfilippo's desire to terminate plaintiff when another employee (Nedra Cooper) informed Dawson that Sanfilippo offered to remove any suspension or write up from Cooper's file if Cooper assisted in terminating plaintiff, (3) Edds offered Dawson a steak dinner if he fired Cooper for revealing Sanfilippo's offer, (4) plaintiff was routinely subjected to "stigmatizing beliefs" regarding her age, (5) plaintiff's supervisor told her she was being set up for termination, (6) Sanfilippo made discriminatory comments about plaintiff, (7) Sanfilippo decided to terminate plaintiff based on information supplied by Hale, and (8) plaintiff was fired following Dawson's internal complaint that plaintiff was discriminated against and treated differently than other employees (i.e., plaintiff's firing was done out of retaliation).

None of plaintiff's arguments directly establishes discrimination. First, as evidence of Hale's comments and threats, plaintiff cites only her own deposition testimony.[7] At her

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[5] When analyzing discrimination claims, Michigan courts often utilize federal precedent for guidance. *Harrison v Olde Financial Corp*, 225 Mich App 601, 606; 572 NW2d 679 (1997).

[6] We note that plaintiff makes no allegation that this was a "mixed motive" case. See *Sniecinski*, 469 Mich at 133 ("In a direct evidence case involving mixed motives, i.e., where the adverse employment decision could have been based on both legitimate and legally impermissible reasons, a plaintiff must prove that the defendant's discriminatory animus was more likely than not a 'substantial' or 'motivating' factor in the decision.").

[7] Plaintiff has failed to identify which of her three depositions support this claim.

deposition, however, plaintiff testified that she learned of these comments through Dawson and had never actually heard these comments and threats personally. In the absence of any exception (and plaintiff cites none), such evidence constitutes inadmissible hearsay,[8] which is insufficient to oppose summary disposition. *Woodman*, 280 Mich App at 135.

In any event, in context, this evidence amounts to nothing more than "stray remarks" that cannot be considered evidence of discriminatory animus. *Sniecinski*, 469 Mich at 136. To be sure, defendants presented evidence that Hale was not a decision maker in plaintiff's termination, no evidence was presented that Hale was involved in or that the remarks were utilized in the decision making process, plaintiff admitted that such comments amounted to mere "shop talk" (indeed, plaintiff admitted she made similar comments about Hale), and plaintiff failed to establish when the comments and threats were made in relation to her termination. See *id*. at 136 n 8. For these reasons, Hale's comments and threat are not direct evidence of discrimination.[9]

Next, as plaintiff provides no citation to the record in support of her claims that Sanfilippo and Edds offered bribes, that she was "routinely subjected to stigmatizing beliefs regarding her age," or that Sanfilippo made discriminatory remarks, she has abandoned these claims. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998). Regardless, these allegations are meritless because: Cooper's statement to Dawson about the bribe would constitute inadmissible hearsay, *Woodman*, 280 Mich App at 135; Edds's offer to Dawson would at best require an inference or presumption of discrimination, *Cerutti*, 349 F3d at 1061; plaintiff does not explain how Edds's offer to Dawson shows causation, *Sniecinski*, 469 Mich at 132; the reference to "stigmatizing beliefs," without more, amounts to a conclusory allegation insufficient to support summary disposition, *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996); and plaintiff admitted at her deposition that Sanfilippo never made discriminatory remarks.

Likewise, plaintiff provides no citation to the record to support her claims regarding: her supervisor's statement the she was set up for termination, the basis of Sanfilippo's decision, or Dawson's internal complaint. In any event, to the extent support may be gleaned from the affidavits attached to plaintiff's brief, we find that these claims suffer from the same deficiencies as those previously set forth: namely, they are based on inadmissible hearsay and conclusory allegations. To this, we would add that Dawson's conclusory averments concerning the circumstances of plaintiff's termination (e.g., his claims that Hale repeatedly indicated he would get plaintiff fired) directly contradict his prior deposition testimony in which he asserted that he did not know why plaintiff was terminated, did not know who ultimately decided to terminate

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[8] A statement made out of court and offered for its truth is hearsay by definition. MRE 801(c).

[9] Plaintiff obliquely references Hale's comments in conjunction with her hostile work environment claim. However, besides the comments' inadmissibility, plaintiff fails to show how the comments "interfere[d] substantially with [her] employment or created an intimidating, hostile, or offensive work environment." *Downey v Charlevoix Co Bd of Co Road Comm*, 227 Mich App 621, 629; 576 NW2d 712 (1998).

plaintiff, and did not know whether Hale was involved in that decision. Parties may not use affidavits contradicting prior deposition testimony in order "to contrive factual issues," and we decline to further consider what appears to be an attempt to create "sham issues of fact." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 481-482; 633 NW2d 440 (2001).[10]

Alternatively, plaintiff alleges that TKS lacked a legitimate nondiscriminatory reason for termination based on Dawson's averment that similarly situated male employees produced doglegs and staggered lifts without facing discipline. This argument invokes the second prong of the *McDonnell Douglas* burden-shifting test to prove discrimination through circumstantial or indirect evidence. *Sniecinski*, 469 Mich at 133-134, citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).[11] Even assuming without deciding that plaintiff has satisfied the first prong and established a prima facie case of discrimination, plaintiff's reliance on Dawson's affidavit is improper since it merely restates plaintiff's argument in a conclusive manner.

In any event, plaintiff's assertion that similarly situated male employees were not disciplined for approving doglegs and staggered lifts does not show disparate treatment. Indeed, it was plaintiff's failure to comply with the appropriate tagging procedures and her approvals in the context of preparing goods for shipment that led, in part, to disciplinary procedures and her termination. However, plaintiff makes no mention of *any* circumstances surrounding the other inspectors' alleged approval of defective steel. Such allegations, without more, fall far short of plaintiff's burden to prove that she and the other inspectors "were similarly situated, i.e., 'all of the relevant aspects' of [their] employment situation[s] were 'nearly identical.'" *Town v Michigan Bell Tel Co*, 455 Mich 688, 699; 568 NW2d 64 (1997). What is more, plaintiff does not contest the stated reasons for her termination. Consequently, we find her argument on this score utterly baseless. Summary disposition was appropriate in this case.

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[10] Although not cited in the argument section of her brief, plaintiff alleges in her facts section – without citation to the record – that TKS's failure to follow the appropriate grievance procedure raised an issue of fact concerning discrimination. However, even if the procedure was violated, plaintiff presents no evidence showing that the violation was deliberate. See *McLemore v Detroit Receiving Hosp & Univ Medical Ctr*, 196 Mich App 391, 396; 493 NW2d 441 (1992). Causation is, therefore, lacking.

[11] Under that test, plaintiff bears the initial burden to present a prima facie case of discrimination. *Sniecinski*, 469 Mich at 134. If plaintiff succeeds, the burden shifts to defendants "to articulate a legitimate, nondiscriminatory reason for the adverse employment action" to rebut the presumption of discrimination. *Id*. The burden then shifts back to plaintiff to prove defendants' reasons were a mere pretext for discrimination and not the true reasons for discrimination. *Id*.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Deborah A. Servitto